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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-71

THE KING'S GARDEN, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 498 F. 2d 51. The letter-decision of the Federal Communications Commission, (Pet. App. 30a-33a) is reported at 34 FCC 2d 937. The memorandum opinion and order of the Commission (Pet. App. 22a-29a) is reported at 38 FCC 2d 339.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on May 6, 1974. The petition for a writ of certiorari was filed on August 5, 1974. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a decision of the Federal Communications Commission requiring a radio broadcast licensee, which is also a religious organization, not to discriminate on religious grounds in hiring broadcast personnel was a reasonable exercise of its public interest responsibilities under the Communications Act of 1934, which neither conflicts with the Equal Employment Opportunity Act of 1972 nor violates the First Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment of the Constitution is set forth at Pet. 3. Section 3 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II) 2000e–1 (Supp. II) is also set forth at Pet. 3. Section 303 of the Communications Act of 1934, 48 Stat. 1082, as amended, 47 U.S.C. 303, and Sections 73.125 and 73.301 of the Rules of the Commission, 47 C.F.R. 73.125 and 73.301, are set forth at Pet. 3–4.

STATEMENT

1. Petitioner, The King's Garden, Inc., is the licensee of radio stations KBIQ–FM and KGDN in Edmonds, Washington. King's Garden is a nonprofit, interdenominational religious and charitable organization which asserts that its basic goal is to "share Christ world wide" (Pet. 4). It insists that all personnel of its stations share its religious views and, to that end, asks job applicants such questions as "Are

you a Christian?" "How do you know you are a Christian?" "Is your spouse a Christian?," and requests them to "Give a testimony."

This practice came to light in mid-1971 when a Mr. Trygve Anderson, who had unsuccessfully applied to King's Garden for a job as announcer or newsman, complained to the Commission. In response to the F.C.C.'s inquiries, petitioner conceded its discriminatory hiring policy, but argued that it was permitted by Title VII of the Civil Rights Act of 1964. The Commission found that petitioner was violating the F.C.C.'s anti-bias rules and required it to end its religious discrimination except only with respect to "those persons hired to espouse a particular religious philosophy over the air" (Pet. App. 30a–33a).[1] Subsequently, petitioner requested the Commission to reconsider its ruling in light of the recently enacted 1972 amendment to Title VII of the Civil Rights Act.[2] In an opinion released November 30, 1972, the Commission reaffirmed its prior decision. It stated that it would not modify its anti-bias rules except in a rule-making proceeding and then only "upon a public

[1] Petitioner was ordered to submit a statement of its future hiring practices which would be consistent with the F.C.C. anti-bias rules.

[2] Prior to this amendment, Section 702 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, exempted religious organizations from the requirements of the Act "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its *religious* activities * * *" (emphasis added). The 1972 amendment deleted the word "religious."

interest finding under the Communications Act" (Pet. App. 26a).[3]

The Commission noted that its authority comes from the Communications Act and not the Civil Rights Act. Under its statutory mandate, it has the power to determine whether licensee conduct is related to broadcasting in the public interest and its anti-bias rules for licensees are considerably broader than the Civil Rights Act.[4] Finally, the Commission determined that the 1972 amendment to the Civil Rights Act did not require any changes in its anti-bias rules since that amendment did not alter its mandate under the Communications Act. It also rejected petitioner's claim that the anti-bias rules violated the Free Exercise Clause of the First Amendment.

2. On petition for review the court of appeals affirmed the F.C.C. rulings.[5] The majority opinion suggested that the 1972 amendment to the Civil Rights Act may violate the Establishment Clause of the First

[3] King's Garden had filed a Petition for Rulemaking advocating an amendment to the F.C.C. anti-bias rules which would make them consistent with the 1972 amendment to the Civil Rights Act (Pet. App. 23a).

[4] The F.C.C. rules apply to all broadcasters regardless of size while the Civil Rights Act applies only to employers with 15 or more employees. In addition, broadcast licensees are obligated in some circumstances take strong affirmative action to hire members of minority groups. See 47 C.F.R. 73.125(b), 73.301(b), 73.599(b). 73.680(b) and 73.793(b); see also *Nondiscrimination in Employment Practices: Notice of Proposed Rulemaking*, 13 FCC 2d 766; *Nondiscrimination in Employment Practices*, 18 FCC 2d 240.

[5] The petition was filed in the Ninth Circuit and ultimately transferred to the District of Columbia Circuit.

Amendment (Pet. App. 5a).[6] However, the majority expressly declined to decide this question (Pet. App. 13a). Instead, on the basis of the legislative history of the amendment, it determined that Congress had not intended to alter the anti-bias rules of the F.C.C. Those rules were adopted pursuant to the Commission's statutory mandate under the Communications Act, which confers broad power on the agency to assure that broadcasters operate in the public interest. The court also noted that the Commission had examined the amendment to determine if it had any relevancy to its mandate and had determined that no change in its rules was required.

Finally, the court rejected petitioner's argument that the F.C.C.'s anti-bias rules violate the Free Exercise Clause of the First Amendment. The court observed that petitioner is subject to F.C.C. regulation only because it voluntarily sought and received a broadcast license and that such a license is "burdened by enforceable public obligations" (Pet. App. 17a). The court concluded that a religious organization cannot "convert a licensed communications franchise into a church" (*ibid.*). Focusing on the special exemption recognized by the Commission, the court observed that

[6] The court expressed doubt that the amendment had a secular purpose, suggesting instead that the amendment had the "primary effect" of advancing religion (Pet. App. 7a–8a). Finally, the court noted that the amendment may invidiously discriminate against non-religious commercial organizations in violation of the Due Process Clause of the Fifth Amendment (*id.* at 12a).

the Commission will have to determine which jobs require the espousal of religious views, that it has the expertise necessary to perform this function, and that any disputes between the Commission and a licensee over the characterization of a particular position can be resolved if and when they arise (Pet. App. 19a).

Chief Judge Bazelon concurred in the result. He did not believe that the F.C.C. could enforce employment requirements which directly conflict with the Civil Rights Act. However, since he believed that the 1972 amendment to the Civil Rights Act is unconstitutional, he agreed that the F.C.C. was not obligated to follow it (Pet. App. 21a).

ARGUMENT

The decision of the court of appeals is correct, and the petition presents no issue warranting further review.

1. The rules of the F.C.C. are adopted pursuant to its statutory mandate as reflected in the Communications Act of 1934. Under this statute, the F.C.C. cannot issue a broadcast license unless it first determines that the public convenience, interest or necessity would thereby be served. The "mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive,' *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943), whose validity we have long upheld." *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380.

The Commission has promulgated a number of regulations which define various aspects of broadcast

licensees' public interest responsibilities. The anti-bias rules at issue in this case were adopted because the Commission concluded that a licensee which engaged in discriminatory hiring practices could not be viewed as making a good faith effort to operate its station in the public interest. *Nondiscrimination in Employment Practices,* 13 FCC 2d 766, 769–770. These regulations reflect the public policy against racial, religious and sexual discrimination in employment, and are consistent with numerous federal and state statutes and regulations which prohibit discriminatory hiring practices,[7] which are, of course, relevant to the public interest criterion which the Commission must apply. See *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 80; *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U.S. 86. But it does not follow that the Commission, operating under a special statutory mandate, is compelled to tailor its rules to copy precisely every exemption announced in other laws.

There is no evidence in the legislative history of Title VII or—more relevantly—the 1972 amendment to the Civil Rights Act that Congress intended to modify the anti-bias rules of the F.C.C. These rules were simply not discussed. *Legislative History of the Equal Employment Opportunity Act of 1972,* Senate Labor and Public Welfare Committee (1972). In fact, this legislative history indicates that the primary purpose of the amendment was to restrict the authority

[7] See, *e.g.*, 42 U.S.C. 1981, 2000e, *et seq.*; Exec. Order No. 11246, 30 Fed. Reg. 12319; Ann. Code of Md., Art. 49B, § 19.

of the Equal Employment Opportunity Commission to oversee the hiring practices of private educational institutions controlled by religious organizations (*id.* at 843–852). The decision to exempt those organizations from regulation by E.E.O.C. cannot, without more, be read as intending a broad immunity from *all* regulations.

The F.C.C. has it own statutory mandate which requires it to consider broader public interest considerations. Of course, it should carefully examine the effect of the amendment on its anti-bias rules. That has been done in this case. We submit that the Commission's decision not to alter its rules except in the context of a rulemaking proceeding was proper. Cf. *American Commercial Lines, Inc.* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 590–591.

2. The F.C.C.'s anti-bias rules do not violate petitioner's rights under the Free Exercise Clause of the First Amendment. Petitioner is a broadcast licensee and as such possesses no greater rights than any other broadcast licensee. "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion Broadcasting Co.* v. *Federal Communications Commission, supra,* 395 U.S. at 394. Once a licensee has sought and been "granted the free and exclusive use of a limited and valuable part of the public domain," the license it receives "is burdened by enforceable public obligations." *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1003 (C.A.D.C.); see also *Brandywine-Main Line Radio, Inc.* v. *Federal Com-*

munications Commission, 473 F. 2d 16 (C.A.D.C.), certiorari denied, 412 U.S. 922. These "enforceable public obligations" have been imposed on all other broadcast licensees only because they voluntarily decided to engage in broadcasting. Petitioner cannot claim a wholesale exemption merely because it is a religious organization.

What is more, the F.C.C.'s anti-bias rules expressly recognize Petitioner's First Amendment rights. The Commission has withheld application of its anti-bias rules with respect to those employees hired to espouse "a particular religious philosophy over the air * * *." ~~recognize petitioner's First Amendment rights. The~~ "a particular religious philosophy over the air * * *" (Pet. App. 32a–33a). On its face, this exemption is sufficiently broad to protect petitioner's rights under the Free Exercise Clause of the First Amendment because it permits it to hire employees sympathetic to its religious orientation to espouse its religious views over the air. As the court below noted, while this exemption will require the F.C.C. to determine what jobs involve the espousal of religion, the Commission has traditionally been permitted to apply its expertise in the field of broadcasting to complex First Amendment problems. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102–103; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, *supra*, 395 U.S. at 386–401. To argue that this evaluation procedure may result in excessive entanglement of church and state ignores the fact that petitioner's relationship with the F.C.C. arises not from its status as a church but from its

status as a federally regulated broadcast licensee which also happens to be a religious organization.

Regardless of the licensee's religious affiliation, the Commission is responsible under the Communications Act for assuring that its station is operated in the public interest. Petitioner's religious affiliation gives it no exemption either from the Communications Act or from Commission regulations thereunder.[8] Indeed, were it to enjoy such a special status, serious questions might arise under the Establishment Clause, which "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization." *Gillette* v. *United States*, 401 U.S. 437, 450.

Petitioner has not claimed in this record that its discriminatory hiring practices are necessary in order for its principals to practice their religion. Compare *Wisconsin* v. *Yoder*, 406 U.S. 205; *Sherbert* v. *Verner*, 374 U.S. 398; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Cantwell* v. *Connecticut*, 310 U.S. 296. Nor is it evident why the limited exemption granted by the Commission is not fully sufficient to permit petitioner

[8] All broadcast licensees including religious licensees are required to ascertain community problems and devote portions of their programming toward meeting those problems. In addition, they must abide by the fairness doctrine and live up to their programming representation. The licensee must meet the needs of the community as a whole, not a particularized segment of it. See generally *Primer on Ascertainment of Community Problems*, 27 FCC 2d 650; *Young People's Association for Committee* v. *Federal Communications Commission*, 467 F. 2d 408 (C.A.D.C.); *Brandywine-Main Line Radio, Inc.* v. *Federal Communications Commission*, *supra*.

freely to carry out its religious mission. The Free Exercise Clause requires no more.

3. Finally, petitioner contends that this Court should review this case in order to determine the constitutionality of the 1972 amendment to the Civil Rights Act. The short answer is that the question was not decided below and is unnecessary to the disposition of the case. It is thus not properly tendered here, and, this Court should not accept petitioner's invitation prematurely to decide the issue. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (Brandeis, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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